August 26, 2002

Mr. A. Wade Norman
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Dallas, Texas 75201-3387

OR2002-4757

Dear Mr. Norman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 167060.

The Grand Prairie Independent School District (the "district"), which you represent, received a request for the personnel file, including resignation/termination information, for a named individual. You state that the district has released or will release certain information to the requestor but claim that the remainder of the responsive information is excepted from disclosure under sections 552.026, 552.101, 552.102, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

First, you argue that nine pages of information you have marked in Exhibit B are made confidential pursuant to section 21.355 of the Texas Education Code and are therefore excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 21.355 of the Education Code provides, "[a] document evaluating the performance of a teacher or administrator is confidential." This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, this office also concluded that an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of his or her evaluation. *Id.* Upon review of the documents you seek to withhold under section 21.355, we conclude that only one of these documents

evaluates the performance of a teacher for purposes of section 21.355 of the Education Code. We have marked this document, which must be withheld from disclosure under section 552.101 of the Government Code. The remainder of the submitted documents do not evaluate the overall performance of an administrator for purposes of section 21.355 of the Education Code. Thus, these documents are not confidential under that statute.

You also argue that the remaining eight pages of information, as well as the remainder of the information you have submitted as Exhibit B, is protected under section 552.102, which excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). The privacy that section 552.102(a) provides to personnel records corresponds to the protection that section 552.101 provides in conjunction with the common-law right to privacy. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld under section 552.101 in conjunction with common law privacy when (1) it is highly intimate and embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) there is no legitimate public interest in its disclosure. *Id.* at 685. Employee privacy under section 552.102(a) is narrower than common-law privacy under section 552.101, however, because of the greater legitimate public interest in matters involving public employees. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.); Open Records Decision Nos. 473 at 3 (1987), 444 at 3-4 (1986), 423 at 2 (1984). Generally, section 552.102(a) protects employee information from disclosure only when that information reveals "intimate details of a highly personal nature." *See* Open Records Decision No. 423 at 2 (1984).

To demonstrate the applicability of common-law privacy, a person must affirmatively establish *both* prongs of this test. *Id.* at 681-82. In applying Texas common law, the courts have rejected the balancing of interests test. *See Industrial Found.*, 540 S.W.2d at 681-82 (under policy determination that Texas legislature made in enacting section 552.101, court is not free to balance public's interest in disclosure against harm to person's privacy); *Ross v. Midwest Communications, Inc.*, 870 F.2d 271, 272 (5th Cir. 1989) (rejecting "open-ended balancing of interests" and applying *Industrial Foundation* test). As the Austin Court of Appeals has noted, the requirement of showing both elements of the *Industrial Foundation* test properly "balances" the individual's privacy and the articulated purpose of the PIA. *Hubert*, 652 S.W.2d at 550.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of

information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

With regard to the information at issue, as the remaining eight pages in Exhibit B that you also sought to withhold under section 21.355 of the Education Code do not reveal intimate details of a highly personal nature, we conclude this information is not excepted under common-law or constitutional privacy. In seeking to withhold the photographic information in Exhibit B, you inform us that the district has released to the requestor a summary of the investigation that describes the images found on the named individual's computers and on the floppy disk found within his laptop computer. You state that "[r]eleasing the actual photographs would serve only to invade the privacy of individuals whose photographs appear in the file, without serving any legitimate public interest." In support, you rely on the holding in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.– El Paso 1992, writ denied). The court in *Ellen* ordered the release of the affidavit of the person under investigation for sexual harassment and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. As noted, however, *Ellen* addressed the applicability of common-law privacy to information concerning sexual harassment investigations. Although most of the information in question in this case is of a sexual nature, these records do not involve allegations of sexual harassment. Consequently, the holding in *Ellen* is not applicable to any of the information in question.

Upon review of the photographs at issue, we note that you acknowledge that the photographs were located in a sealed envelope within the individual's personnel file. You have also provided information indicating that the computers on which the images were found belonged to the district, that the computers were located on district property, at an elementary school, and that the computers were for the use of the named individual. Finally, you indicate that the named individual is a former principal and assistant principal for the district. Given the aforementioned factors, we find that the public has a legitimate interest in the information at issue, even if that information may be intimate or embarrassing to the named former principal. Thus, these photographs may not be withheld under a common-law right of privacy belonging to the named former principal. *See* Open Records Decision Nos. 444 at 5 (1986) (stating that public has legitimate interest in knowing reasons for dismissal, demotion, or promotion of a public employee), 423 at 2 (1984) (stating that information may not be withheld under section 552.102 if it is of sufficient legitimate public interest, even if person of ordinary sensibilities would object to release on grounds that information is highly intimate or embarrassing), 405 at 2 (1983) (stating that information relating to manner in which public employee performed his or her job cannot be said to be of minimal public interest).

We next address whether release of the information in Exhibit B would violate the named former principal's constitutional right to privacy. Under the federal constitution, "in the context of governmental disclosure of personal matters, an individual's right to privacy is violated if: (1) the person had a legitimate expectation of privacy; and (2) that privacy

interest outweighs the public need for disclosure." *Cantu v. Rocha*, 77 F.3d 795, 806 (5th Cir 1996); *see also Abdeljalil v. City of Fort Worth*, 55 F. Supp.2d 614 (N.D. Tex. 1999). The constitutional test requires a balancing of these two elements. This balancing test considers a number of factors, including the potential for harm in any subsequent non-consensual disclosure of the information, and "whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access." *Doe v. Attorney Gen.*, 941 F.2d 780, 796 (9th Cir. 1991) (quoting *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3rd Cir. 1980)). We will apply the balancing test to the information in Exhibit B to determine whether the district must withhold this information under the constitutional right to privacy.

Federal courts have found that a person's sexual orientation is an intimate aspect of his personality, and thus, entitled to privacy protection. *See Sterling v. Borough of Minersville,* 232 F. 3d 190, 196-97 (3rd Cir. 2000). Under the constitutional privacy test, however, we must weigh that privacy interest with the public need for disclosure. As we discussed above, there is substantial public interest in the contents of Exhibit B. Furthermore, we conclude that the legitimate public interest outweighs any privacy interest of the named former principal, and thus, the district may not withhold the information in Exhibit B under a constitutional right of privacy of the named former principal.

We will next address whether any of the other individuals whose photographs appear in Exhibit B have a common-law or constitutional right of privacy that prevents disclosure. We conclude that those photographs in Exhibit B that depict identifiable individuals who are fully nude that were not obtained from publicly available websites are excepted from disclosure under section 552.101 based on a constitutional right of privacy. While there is substantial public interest in this information, the individuals depicted have a right of privacy in pictures of their unclothed bodies. *See Poe v. Leonard*, 282 F. 3d 123, 138-39 (2d Cir. 2002). Given that the individuals depicted did not voluntarily place such information in the public domain, and given that the fact that the existence of these photographs has been disclosed to the public through release of the summary submitted as Exhibit C, we conclude that these individuals have a legitimate expectation of privacy in these photographs that outweighs the public interest.

We find, however, that the individuals in the following categories of photographs do not have either a common-law or constitutional privacy interest that would prevent disclosure under sections 552.101 or 552.102: first, photographs of men who are clothed. We find that these photographs are not intimate or embarrassing, and thus, are not protected by common-law privacy. Furthermore, such photographs do not, on their face or in combination with the other photographs in Exhibit B, reveal these individuals' sexual orientation. *See Cain v. Hearst Corp.*, 878 S.W. 2d 577 (Tex. 1994) (Texas does not recognize cause of action for false light privacy). Thus, we find no constitutionally protected privacy interest in these photographs.

The second category of photographs that are not protected is photographs of men, whether clothed or unclothed, that were obtained from publicly available websites. We find that, as these photographs are in the public domain, the individuals pictured have no reasonable expectation of privacy. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (action for invasion of privacy cannot be maintained where information is in public domain); *Star Telegram, Inc. v. Walker*, 834 S.W 2d 54, 57 (Tex. 1992) (law cannot recall information once in public domain), *Roberts v. Houston Indep. Sch. Dist.*, 788 S.W.2d 107, 111 (Tex. App.--Houston [1st Dist.] 1990). Finally, photographs of men whose faces are hidden and who are therefore unidentifiable are not protected, as the privacy interests of these individuals are not implicated by release of these photographs.

You also argue that one of the photographs at issue, which depicts a district student, is made confidential by the Family Educational Rights and Privacy Act of 1974 ("FERPA"). FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 provides as follows:

> This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.

We conclude that, as the photograph of the district student at issue is held by the district and is directly related to the student, the photograph is an "education record" for purposes of FERPA. However, as you note, section 99.3 of title 34 of the Code of Federal Regulations

provides that "directory information" that may be released by an educational institution upon satisfaction of certain notice requirements includes a photograph of a student.[1] We do not, however, believe that the photograph at issue is "directory information" in this context. In support, we note that in Open Records Decision No. 477 (1987), this office addressed the question of whether information pertaining to degree recipients of a university whose degrees had been revoked, rescinded, cancelled or voluntarily surrendered constituted "directory information." In that ruling, we stated,

> [i]t is true, as the requestor observed, that "directory information" includes "degrees and awards received" . . . . We also acknowledge that this office has held that the term "directory information" is to be liberally construed. Open Records Decision No. 242 (1980). That degrees *awarded* by a university constitute directory information, however, in no way requires the conclusion that degrees *rescinded* by that institution should be so characterized. If one examines the items of information listed in the definitions of "directory information," one sees that the common thread linking them is that they are thoroughly innocuous pieces of information of the type customarily found in public directories. The release of this information would offend no one. The fact that a degree has been rescinded, however, is of an entirely different order. Universities rescind degrees for punitive purposes. Public disclosure of the fact that this step has been taken would be humiliating and offensive to virtually anyone, and would therefore implicate the kind of privacy interest that the Buckley Amendment was designed to protect. This is particularly true if the disclosure comes long after the individual in question has ceased being a student, when he may have established himself as a person of good standing in his community.

We similarly conclude that while a photograph of a district student may constitute directory information in certain contexts, in the present context, in which the photograph was found along with numerous photographs of a sexual nature, the photograph of the student is not directory information. Thus, we conclude that the photograph you have identified as depicting a district student is an education record that must be withheld under FERPA.

To summarize, the document we have marked in Exhibit B must be withheld under section 552.101 in conjunction with section 21.355 of the Education Code. Photographs of

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[1]Section 99.3 of title 34 of the Code of Federal Regulations states: "Directory information means information contained in an education record of a student *that would not generally be considered harmful or an invasion of privacy* if disclosed. It includes, but is not limited to, the student's name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, dates of attendance, grade level, enrollment status (e.g., undergraduate or graduate; full-time or part-time), participation in officially recognized activities and sports, weight and height of members of athletic teams, degrees, honors and awards received, and the most recent educational agency or institution attended." (Italics added).

identifiable individuals who are fully nude that were not obtained from publicly available websites must be withheld under section 552.101 in conjunction with constitutional privacy. The photograph you state depicts a district student must be withheld under FERPA. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Michael A. Pearle

Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/jh

Ref: ID# 167060

Enc. Submitted documents

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